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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1438

SOLITRON DEVICES, INC.,
Petitioner,

against

THE ISLAND TERRITORY OF CURACAO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 25, 1974

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Solitron Devices, Inc. ("Solitron") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 26, 1973.

Opinions Below

The opinion of the Court of Appeals is reported in 489 F. 2d 1313 (2d Cir. 1973). It appears in Appendix A hereto.

The opinion of the United States District Court for the Southern District of New York is reported in 356 F. Supp. 1 (S. D. N. Y. 1973). It appears in Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on December 26, 1973 (C 1).* This Court has jurisdiction of this petition under 28 U. S. C. § 1254(1). This petition, being filed within ninety days of the judgment, is timely under 28 U. S. C. § 2101(c).

Questions Presented

1. Is a foreign arbitral award for damages reflecting estimated welfare costs to Curacao for the failure by Solitron to employ specified numbers of persons in Curacao enforceable under the provisions of the Convention for the Recognition and Enforcement of Foreign Arbitral Awards, which the Senate, in its ratification, specifically limited to claims that are commercial under the national law of the United States?

The District Court answered this question "yes". The Court of Appeals held that it need not answer this question because it decided that the award was enforceable under New York law.

2. Does the Convention on the Recognition and Enforcement of Foreign Arbitral Awards supersede the standards for such enforcement under State law? Will a State law which contravenes the Convention be enforceable in a Federal Court as an alternative claim to a claim under the Convention?

The Court of Appeals held that the Convention did not preempt the matter and that New York State standards for the enforcement of foreign judgments were applicable in a proceeding in the federal courts without regard to whether they were consistent with the Convention.

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* Letters and numbers in parentheses refer to pages of the appendices to this petition, unless otherwise stated.

Statutory Provisions

Applicable portions of the following statutes are printed in Appendix B hereto:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done*, June 10, 1958, [1970] 3 U. S. T. 2517, T. I. A. S. No. 6997.

Federal Arbitration Act, 9 U. S. C. §§ 1 et seq., Act of July 30, 1947, c. 392, § 1, 61 Stat. 669; Pub. L. 91-368, § 1, July 31, 1970, 84 Stat. 692.

New York Recognition of Foreign Country Money Judgments Act, N. Y. CPLR Art. 53, N. Y. Laws 1970, c. 961.

Statement of the Case

Nature of the Case and Proceedings Below

This is a case of first impression involving the interpretation of a multilateral convention on the enforcement of foreign arbitral awards, to which the United States adhered in 1970, and its relationship to the law of New York providing for the enforcement of foreign judgments reflecting foreign arbitral awards. It takes the form of an action to confirm a foreign arbitral award made in Curacao under 9 U. S. C. c. 2, and to enforce a money judgment rendered in Curacao on the same arbitral award under N. Y. CPLR Art. 53. Jurisdiction is based on the existence of a federal question, 9 U. S. C. § 203, and on diversity of citizenship. 28 U. S. C. § 1332.

The District Court (WYATT, D. J.) on March 1, 1973, entered judgment on Curacao's motion confirming the award. The Court of Appeals (KAUFMAN, Ch. J., SMITH and OAKES, C. JJ.) on December 26, 1973, affirmed the judgment of the District Court. The judgments of both courts appear in Appendix C hereto.

Statement of Facts

The facts are undisputed. They are reflected in various documents submitted on behalf of Curacao and uncontroverted affidavits submitted on behalf of Solitron.

The Parties

Curacao is a separate political entity which is part of The Netherlands Antilles, which in turn is a separate part of the Kingdom of the Netherlands (A 2, A 24).

Solitron is a New York corporation with its principal place of business within the Southern District of New York. It is engaged in the design and manufacture of semiconductor devices for the electronics industry (A 2, A 24).

Events Leading to the Contract

In the 1960's Curacao was engaged in an intensive campaign to attract industry in order to develop its economy and reduce the problem of unemployment. At the same time the pressure of foreign competition was forcing Solitron to consider the conduct of part of its manufacturing operations outside the United States (A 3, A 26). Curacao had an agent in the United States who assiduously solicited Solitron through its president Benjamin Friedman to conduct operations in Curacao emphasizing the relatively low prevailing wages in Curacao and the stability of the government of Curacao.

In August 1967, Mr. Friedman made the first of a number of trips to Curacao where he met various high government officers (A 88). He was told of the stability of the government and was assured that he could "rely on the continuation of the very advantageous wage rates then prevalent in Curacao" (App. 76).* He saw that Curacao had a good location for the production and transportation of semiconductor devices, and he "stated to the officials of Curacao that if Solitron came to Curacao

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* Numbers in parentheses preceded by "App." refer to pages of the Joint Appendix in the Court of Appeals.

it wanted to play a significant part in upgrading the working conditions of the people . . ." (App. 76).

His discussions with the leaders of the government eventuated in the signing of the contract of January 12, 1968 (A 25).

The Contract

The parties to the contract were, on the one side, The Netherlands Antilles and Curacao, and, on the other side, Solitron (A 2, A 25). The preliminary recitals (App. 13-14) make it clear that it was entered into for a usual governmental purpose of expanding local industry and increasing employment opportunities. These ends were to be accomplished by establishing an industrial park on 60 acres of land to be provided by Curacao. Curacao agreed to construct two factory buildings. In the larger one, Solitron was to establish its own manufacturing operations and it had available the smaller building for expansion purposes. The parties were to agree (A 22) on the cost of the construction of the buildings which were to be rented to Solitron for 20 years at a specified rent (A 3) with an option to purchase. (App. 20) Solitron agreed to employ at least 100 persons in its operations and to attract other industries to the industrial park looking toward a total future employment for at least 3,000 natives of The Netherlands Antilles (A 3, A 26-27). Solitron agreed to obtain the approval of The Netherlands Antilles of the additional industries which it would attract to the industrial park "In view of the responsibility of the CENTRAL GOVERNMENT for a sound development of the economy of The Netherlands Antilles . . ." (App. 16). Curacao undertook to supply water, electricity, road access and provision for waste removal (A 27).

The laws of The Netherlands Antilles were made applicable to the contract (A 3, A 27), and Article 12 contained the following arbitration clause (A 28):

> "All disputes arising between the CENTRAL GOVERNMENT and/or the ISLAND GOVERNMENT, and SOLITRON as a consequence of or in connection with the present agreement or further agreements for the implementation

> of the present agreement, legal as well as factual, shall be submitted to a board of arbitration. The decision of this board shall be binding on all parties involved in the dispute."

Provisions were made for invoking arbitration and for the conduct of the proceedings (A 28). Article 13 of the contract provided (A 29):

> "SOLITRON shall invariably* choose domicile for everything pertaining to the execution of the present agreement and further agreements made for the implementation or supplementation of the present agreement, as well as for all acts of judicial execution at the office [of a notary public in Willemstad, Curacao]".

Events Subsequent to the Contract

Work began on the building which was to be constructed for Solitron, and Solitron purchased and sent down to Curacao structural steel, complete air-conditioning equipment and modern tables, worth a total of $221,855 (A 30).

The project was aborted, however, following riots which swept the island in May 1969 (A 30, App. 77) and resulted in the overthrow of the government of Curacao. The new government, which is bringing on this action for damages against Solitron, abruptly raised the wage rates by two and one-half times (A 4, A 30), and it was no longer economically feasible for Solitron to manufacture in Curacao (App. 25, A 40, A 72, A 77), and after discussions with representatives of Curacao held in New York, Solitron reluctantly concluded in March 1970 that it could not establish the manufacturing plant (A 24, A 26, A 36, A 39-41, A 77).

Thereupon Curacao claimed damages for rentals and expenses. It also claimed (App. 24):

> "Moreover and of no less importance, the jobs to which you have committed yourself and the expected benefits to our economy resulting therefrom, are not being realised."

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* Or "irrevocably"; Dutch *"onveranderlijk"* (A 4, A 29).

Curacao alleged Solitron had breached its contract, and demanded arbitration (A 31).

Solitron took the position that, by precipitously raising the prevailing wage rate two and one-half times, Curacao itself had

> "made it impossible for us to perform the agreement in question, thereby terminating the agreement and any obligation to arbitrate that we may have had under it" (A 5, App. 26).

Consistent with its position that Curacao, itself, had terminated the contract by its deliberate actions, Solitron specifically revoked whatever authority its designated agent in Curacao had to represent it (A 31).

Solitron took no part in the steps leading up to the arbitration proceedings or in the proceedings themselves, which were held in Curacao in August 1970 (A 5, A 32-3).

The Arbitration, The Award, and the Judgment in Curacao

The three arbitrators heard the case from August 10 to 12, 1970 (A 32-3) and handed down a lengthy opinion on August 13, 1970 (A 33). They found in favor of Curacao and rejected all the defenses that Solitron had previously expressed or which the arbitrators thought Solitron had expressed, although they did not accept all Curacao's claims as to damages (A 5, A 34).

The arbitrators awarded Curacao various costs of construction (A 35-6). They awarded Curacao rent for the period to July 1, 1971 (A 36), with leave to Curacao to claim rent in further arbitration proceedings if it were unable to rent the premises after July 1, 1971 (App. 49). It is interesting to note that the damages awarded for various construction costs and rent (NAfls. 247,106.40)* were almost exactly offset by the value placed by the arbitrators on the structural steel and air conditioning units which Solitron had supplied (NAfls. 266,424.05) (A 6, A 38). In other words, the commercial aspects of this arrangement resulted in a "wash"—the loss to Curacao being matched by the gain to Curacao from the Solitron investment.

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* On the date of the judgment in the District Court, the exchange rate was .558 Netherlands Antilles guilders (NAfl.) to one United States dollar (C 2).

But, the arbitrators went on in considerable detail to determine the increased cost of welfare payments that Curacao would have to make from December 1970 through 1973 because of Solitron's failure to set up an industry to give employment to the 100 workers specified in the agreement (A 6, A 36), and they imposed the burden of those welfare payments (NAfls. 375,000) on Solitron. This item of damages the Court of Appeals said struck it "as unusual" (A 6) although, as noted, it represents as a practical matter the full amount of the claim.

For the period from January 1, 1974 on, by which time the contract obligated Solitron to establish industries which would employ 3,000 natives (A 3), the arbitrators declined to make a ruling, but left it open to Curacao to seek arbitration of the additional amounts it might claim it had to pay out in welfare benefits (A 6-7, A 36-7).

The arbitrators declared that the contract between Curacao and Solitron was dissolved, except for the arbitration provisions (App. 55, App. 56), and ordained that "around January 1, 1974, the more diligent party will be able, in accordance with the said arbitration rules, to submit to arbitration the question" of the welfare payments for the 3,000 workers (App. 56).*

Curacao was awarded Netherlands Antilles fl. 445,682.35, with interest at 6% from July 10, 1970 (A 38). The three arbitrators awarded themselves $15,000 for their four days' work, and charged one half of it, as well as all the expenses of the arbitration (U. S. $1,665), to Solitron (A 38).

The same day the arbitral award was deposited in the registry of the local court in Curacao (A 25, A 38), and on August 14, 1970 the award was judicially declared enforceable in a document entitled "Writ of Execution" (A 39), which is apparently tantamount to a judgment. It seems that, as a matter of law of

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* The Court of Appeals seemed to think this provision authorized either party to seek arbitration after January 1, 1974 (A 18), but it is more likely that this provision referred only to Curacao. This is certainly the implication of language in the arbitrators' award (App. 51-2).

the Netherlands Antilles, an arbitration award confirmed by a court becomes judicially incontestable after three months (A 39).

On April 7, 1971, a marshal of a court in Curacao sent a writ to Solitron at its main business address in Tappan, New York, demanding payment of the amounts of the arbitral award (A 39). The writ stated that Solitron had chosen domicile in Willemstad, Curacao, but went on to state that "respondent [Solitron] is no longer domiciled in the Netherlands Antilles . . ." (A 13, A 39).

The Action in the District Court

In February 1972 Curacao began this action seeking a judgment in the Southern District of New York for the amount awarded to it by the arbitrators (A 25).

The action was in the alternative (A 2, A 25). Curacao claimed it was entitled to judgment in the Southern District of New York on the award of the arbitrators, by reason of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (B 1-8), which was effectuated by Chapter 2 of the Federal Arbitration Act (B 13-14). Curacao further claimed it was entitled to judgment in the Southern District of New York under the law of New York, by reason of the Uniform Foreign Country Money-Judgments Recognition Act (B 15-18).

Solitron admitted executing the contract dated January 12, 1968 and did not dispute the documentary material which Curacao had submitted (App. 67-8). Its answers contained many affirmative defenses (A 25).

Curacao moved for judgment. Solitron opposed the motion, submitting an affidavit of its president, Benjamin Friedman (App. 75-80). The allegations of this affidavit were not controverted.

Judge Wyatt handed down his decision in February 1973 in favor of Curacao (A 24-46). Judgment was entered thereon in

the total amount of $257,855.75 (C 2).* The Court of Appeals affirmed the judgment of the District Court in December 1973 (C 1) in an opinion by Judge Oakes (A 1-20).

Rationale of the Opinions Below

The District Court found no defects in Curacao's arbitral award under the Convention or in its judgment under the New York act. It briefly disposed of Solitron's major contention that the contract between the parties was not a "commercial" one within the meaning of the Convention by stating that it "seems clearly to be 'commercial'." (A 44). The Court went on to add that even if that were not so, the judgment based on the award would be enforceable under New York law, which has no requirement that the contract be "commercial" (A 44).

The Court of Appeals held that the Convention as to awards did not preempt the New York law as to judgments (A 9-11) and that the judgment was enforceable under New York law (A 20). The Court stated that it was not necessary, therefore, to decide the applicability of the "commercial" limitation of the Convention (A 20).

Both courts below were troubled by the arbitrators' award to Curacao of compensation for the added social welfare payments which they thought Curacao would have had to make because of Solitron's failure to establish jobs for 100 people (A 6, A 9 n. 4, A 14 n. 8, A 44), an award that the District Court recognized could only have been "made and justified only because Curacao was a government" (A 44); but the courts took the position that this award was part of the measure of damages, as to which the arbitrators had the final word (A 15, A 44). Both courts stressed the point that Solitron had not appeared in the arbitration proceeding to raise its various defenses there (A 5, A 16, A 18-19, A 43, A 44), but were unwilling to recognize that the compliance of the award with the Arbitral Convention is to be determined in the first instance by the federal court and that the arbitrators had no power to decide a matter which the Con-

* The District Court also dismissed Solitron's counterclaim for Curacao's conversion of the materials which Solitron had brought to Curacao (A 46, C 2).

vention and the implementing legislation had entrusted to the forum where enforcement was being sought.*

Reasons for Granting the Writ

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides the means by which a party may enforce a foreign arbitral award in the United States or in any of the other subscribing countries. In and of itself it reflects positions of the highest and most sensitive public policy. It remained pending before the Senate for ten years. In 1968 the Senate acceded to it with the reservation that the United States would "apply the Convention only to differences arising out of legal relationships . . . which are considered as commercial under the national law of the United States" (B 7). Thereafter, Congress enacted Chapter 2 of the Federal Arbitration Act in 1970 which contained the same limitation on enforcement (B 9). Only then did the President proclaim the Arbitral Convention (B 1-B 8) and it became "the supreme law of the land" (U. S. Const. Art. VI, cl. 2). It is absolutely essential for the effective implementation of the Convention that serious ambiguity be eliminated as to its meaning and as to its effect vis-a-vis conflicting state provisions for enforcement.

This appears to be the first instance of a contested proceeding pursuant to the provisions of the Arbitral Convention and the Federal Arbitration Act. The basic position of the District Court was that it accepted the proposition that the Curacao claim arose from a "commercial" relationship with Solitron and was therefore not excluded from the Convention. The Court of Appeals ignored the basic approach of the District Court that the Convention was applicable and proceeded on the theory that

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* Of course, if Solitron had appeared in the arbitration and its defenses had been rejected there, the courts no doubt would have ruled that Solitron was bound by its appearance. Either approach evades the duty imposed upon the courts of deciding the compliance of the award with the Convention. In all fairness to the arbitrators, it must be said that they did not purport to decide any question under the law of the United States.

a New York law with conflicting standards prevailed, and it permitted the Curacao claim on that theory. Did it thereby repudiate the theory of the District Court by implication? And, what of its own position that an inconsistent New York State law is not superseded by the Convention? It is most important that there be authoritative determination of these issues:

1. Whether the Arbitral Convention applies to claims by a foreign government for such governmental expenses derived from a breach of contract as welfare payments which it has made; and

2. Whether the Arbitral Convention supersedes inconsistent State law.

I

The claim of Curacao for reimbursement of its estimated welfare payments to local inhabitants who were not employed by Solitron does not arise out of a legal relationship which is considered as commercial under the national law of the United States.

Solitron contends that to open the door to domestic enforcement of foreign arbitral awards reflecting regular governmental expenditures such as this utterly destroys the limitations imposed by the United States Senate in its ratification of the convention. As we have pointed out, were this an ordinary commercial transaction and absent this claim of damages based upon the expenses of governmental functions, the gain by Curacao from Solitron's investments in the properties would just about exactly cover the loss to Curacao occasioned by Solitron's failure to pay rent and various construction costs. So it is clear that the entire claim which is being pursued here was for the welfare payments by Curacao to its local residents who otherwise would have worked in the factory. The District Court decided that Curacao had the right to pursue such a claim:

> "The items are most unusual, it is true, and would not be awarded to the usual landlord on breach of a contract.

> The award could only have been made and justified because Curacao was a government.
>
> "The difficulty for Solitron is that, assuming (but without deciding) that it was error for the arbitrators to award such damages, it is not the function of a court to correct such an error. The statute specifies the grounds for vacating an award (9 U. S. C. § 10) but error in fact or law is not among them." (A 44).

The District Court erred in failing to recognize that, before it could enforce the arbitral award, it first had to decide whether the award qualified for enforcement under the Convention as limited by the Senate. This is not a decision that can be left to the arbitrators, who were completely powerless to decide what was "commercial under the national law of the United States" (B 7). The award of damages that "could only have been made and justified because Curacao was a government" (A 44) was not merely an error by the arbitrators, but manifested the fact that the award arising out of the contract between Curacao and Solitron was excluded from enforcement by the Senate's limitation on the Convention. The courts below were not being asked to correct an error by the arbitrators, but to find that their action in awarding the damages for social welfare payments was one more proof that their award did not comply with the Convention as limited and therefore could not be enforced.

As noted there has not as yet been a clear and authoritative interpretation of the expression "legal relationships . . . which are considered as commercial under the national law of the United States". In the case at hand, the whole essence of the contract between Curacao and Solitron depends upon the exercise of non-commercial, purely governmental power for non-commercial, purely governmental purposes by Curacao. The assembling of land for an industrial park has long been held to be an appropriate governmental purpose. *Cannata* v. *City of New York*, 11 N. Y. 2d 210, appeal dismissed, 371 U. S. 4 (1962); *Courtesy Sandwich Shop* v. *Port of New York Authority*, 12 N. Y. 2d 379, appeal dismissed, 375 U. S. 78 (1963). Clearly the government undertook this project because it was not feasible on a commercial basis and that was the very justification for the resort to

governmental powers in bringing it to pass. Therefore Solitron was approached by Curacao as a government desirous of the assistance of Solitron in solving the serious governmental problem of attracting industry. The relationship between the parties was clearly predicated upon the governmental responsibilities and the governmental authority of Curacao. There could not have been a mere commercial relationship between them such as might have existed if Curacao merely wished to purchase electronic components from Solitron.

But more than that, the relationship between the parties is most vividly portrayed in the nature of the claim which is now pursued by Curacao against Solitron: and that is a claim to be reimbursed for its welfare payments. By any stretch of the imagination, can this be deemed to be commercial? Would it be commercial if Curacao added to its claims an estimated loss of various taxes?

We believe that the answer to this problem is simple, straightforward and practical. There is no need to search for analogies. If the reservation of the Senate meant anything, it meant that Curacao could not use the United States Courts to reimburse itself for its welfare program.

II

The convention of the Recognition and Enforcement of Foreign Arbitral Awards and Chapter 2 of the Federal Arbitration Act supersede inconsistent provisions of New York Law.

When this matter came on for argument before the Court of Appeals, the issue was whether or not the claim fell within the Arbitral Convention. The Court, as indicated by its decision, skirted this entire issue and reached the conclusion that the award was enforceable pursuant to the provisions of the New York Recognition of Foreign Country Money Judgments Act (B 15-B 18) and therefore that it was not necessary to consider the applicability of the Arbitral Convention (A 20). The ap-

parent position of the Court of Appeals is that a party seeking the enforcement of an arbitral award in any state is entitled to such provisions of treaties and Federal law on the one hand and State law on the other hand as are most advantageous. We think that this was error.

The expression of a clear Federal policy either in the substantive or procedural area has invariably been held to preempt the field with the effect not only of eliminating inconsistent State provisions but of even eliminating state laws that are complementary or supplementary.

An area in which Federal authority is particularly compelling is that of foreign relationships. Essential to foreign relationships is the whole matter of the recognition of foreign judgments, decrees, awards and so forth. Over the years, various states have enacted provisions relating to the circumstances under which foreign judicial and arbitral awards or decrees would be enforced. The whole purpose of the Arbitral Convention was that it would provide a uniform scheme among all of the countries participating which would work to the mutual benefit of the participants. Obviously when the matter is so treated, it becomes a significant United States diplomatic interest; and, indeed, it is dealt with in an international treaty which in turn was implemented by an Act of Congress. To permit each state to maintain its own individual standards now interferes with the foreign policy of the United States as well as generates a chaotic domestic situation. We do not think it appropriate that Curacao should have rights in the Federal District Court in the Southern District of New York which are more liberal than would be the rights of Solitron in the courts of Curacao. This is just the sort of situation that could be created with individual state legislators establishing standards of their own at variance with and contradicting and undermining the uniform standards provided by the Convention.

Directly in point is *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). There this Court invalidated the Pennsylvania alien registration statute even though that statute did not conflict with the federal alien registration statute but merely supplemented it. This Court laid great stress on the power of the federal government in foreign

affairs as outweighing the existence of concurrent state power in the field, 312 U. S. at 66-7, 68:

> ". . . where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."
>
> * * *
>
> ". . . it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits . . ."

In the case at bar the Court of Appeals for the Second Circuit proceeded on the assumption that the New York State standard for the recognition of foreign judgments based upon foreign arbitral awards contravened the treaty and the federal standards and it disregarded the Senate's reservation. The Court of Appeals made a point of the fact that New York law did not directly recognize the foreign arbitral award but recognized a foreign judgment based on an arbitral award and distinguished the matter on that basis. The foreign judgment of course had no legal foundation, as the Marshal's writ on the application of Curacao made it clear that Solitron was not domiciled in Curacao (A 14; App. 83). There was no independent support for the foreign judgment. *Sargant* v. *Monroe*. 268 App. Div. 123 (1st Dep't 1944). Clearly this type of legalistic legerdemain is not available for the purpose of avoiding Federal preemption. If the court deems that this area has been preempted by the treaty and by the Federal enabling legislation then resort to the artificialities of assumed jurisdiction can be of no avail to defeat it. "A given result at the end of a straight path is not made a different result because reached by following a devious path." *Minnesota Tea Company* v. *Helvering*, 302 U. S. 609, 613 (1948).

Many nations have joined the multilateral Arbitral Convention. It establishes uniform standards which evolved from

lengthy negotiations and which are based upon the principle of international reciprocity. These standards have become applicable throughout the United States. That full Federal control over this matter is essential to the foreign policy of the United States is clear not only from the nature of the subject matter but from the fact that it was expressed at an international convention. It is violative of the most basic concepts of Federal jurisprudence that such standards should be disrupted, modified, contravened or even supplemented by state legislation.

Conclusion

For the reasons stated, we respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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March 25, 1974

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99—September Term, 1973.

(Argued November 15, 1973 Decided December 26, 1973.)

Docket No. 73-1664

THE ISLAND TERRITORY OF CURACAO,

Appellee,

v.

SOLITRON DEVICES, INC.,

Appellant.

Before:

KAUFMAN, *Chief Judge,*
SMITH and OAKES, *Circuit Judges.*

Appeal from a judgment in the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* enforcing a judgment on an arbitration award pursuant to Article 53, New York Civil Practice Law and Rules, and alternatively enforcing the award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-08.

Affirmed.

PAUL WINDELS, Jr., New York, N. Y. (Windels, Merritt & Ingraham, New York, N. Y.; Francis E. Koch, New York, N. Y., of counsel), *for Appellant.*

EDWARD C. WALLACE, New York, N. Y. (Weil, Gotshal & Manges, New York, N. Y., Harold Klapper, New York, N. Y., of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal is by an American manufacturer, the respondent below, from a judgment of the district court granting a petition by The Island Territory of Curacao (Curacao) to confirm an arbitration award made in its favor and to enforce a judgment entered thereon in the courts of Curacao. The arbitration itself arose out of a dispute over a contract, the parties to which were the Central Government of the Netherlands Antilles and The Island Territory of Curacao, both of these political entities being a part of the Kingdom of the Netherlands, and Solitron Devices, Inc. (Solitron), a manufacturer of electronic products from Rockland County, New York, relative to the construction of an industrial park in Curacao and the installation of a Solitron manufacturing facility in the park. Solitron did not participate in the arbitration proceeding in Curacao or in the judicial proceedings in confirmation of the award in Curacao, as to which it had a right under the law of Curacao to bring an action to annul the award. Assorted defenses were urged below and found wanting by the district court, which held that the arbitration award was enforceable under the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, implemented by Title 9 of the United States Code Chapter 2 (§§ 201-08 inclusive), and that the judgment of Curacao was enforceable under Article 53 of the New York Civil Practice Law and Rules, CPLR §§ 5301-09 inclusive, entitled Recognition of Foreign Country Money Judgments.

Because the facts are set forth in extensive detail in Judge Wyatt's capable opinion below, *The Island Territory of Curacao* v. *Solitron Devices, Inc.*, 356 F. Supp. (1 S.D. N.Y. 1973), we will state them only generally for purposes of ease of comprehension here. Suffice it to say that the underlying written agreement between Curacao and Solitron which was executed in Curacao on January 12, 1968, provided basically that, because Solitron wanted an electronics plant there and Curacao and the Netherlands Antilles wanted to attract industry to the islands and create jobs, Curacao agreed to establish an industrial park of about 60 acres and to construct two factory buildings pursuant to Solitron-approved plans and to build an access road and sea water pipes to the building sites; Solitron was to lease the buildings for 20 years at a specified rent and to operate in the larger building and to use or sublease the smaller one, agreeing to put its electronic manufacturing industry into operation within 12 months of completion of the larger building and to "create" at least 100 jobs. Solitron also undertook to "establish itself or otherwise prior to January 1, 1974 manufacturing industries not yet established in the Netherlands Antilles which will in total provide employment for at least 3,000 persons" (including Solitron's own employees). It was agreed that the laws of the Netherlands Antilles would be applicable to the agreement and that all disputes as a consequence of or in connection with it, legal as well as factual,[1] should be submitted to a board of arbitration, the decision of which would be binding. The usual provisions were made for designation of one arbitrator by Solitron and Curacao; they were in turn to designate a

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third arbitrator or, failing an appointment, to have one designated or appointed by the president of the Court of Justice of the Netherlands Antilles. The arbitrators were enjoined to give an award "like good men and true"—"ex aequo et bono." There was a provision that Solitron would "invariably"—retranslate as "irrevocably"—fix as its domicile for everything pertaining to the execution of the agreement as well as "for all acts of judicial execution," the office of a notary public who also was Solitron's attorney in Willemstad, Curacao.

Exchanges of correspondence incorporated as appendices to the affidavit of counsel for Curacao in the district court and statements in the opposing affidavit executed by the president of Solitron indicate that by April 13, 1970, Curacao had completed the two buildings as agreed, but that Solitron had failed to enter into a lease agreement, had failed to pay the costs of maintenance or to insure the buildings as required, and had otherwise treated the agreement as unilaterally terminated by Curacao. Solitron declined to proceed to arbitration on the basis that there had been express representations made regarding the favorable economic climate of Curacao particularly in respect to wage rates and availability of labor at those rates, namely, approximately 45 United States cents per hour. What had happened was a change in government and a revision upward of the minimum hourly rate of wages to $1.10 (U.S.) in January of 1970. Solitron conceded that the electronics industry was exempted from the minimum wage increase but, quoting from counsel's letter to Curacao of May 15, 1970, claimed that as a practical matter "there is no prospect of our being able to hire employees for less than it" and this "new wage rate destroys the economic advantage of manufacturing in Curacao." Other claims are set forth in the opposing affidavit of Solitron's president, but these are what might be called window dressing, since the real claim

was, as the letter of May 15 stated, that "By its own act, therefore, your government made it impossible for us to perform the agreement in question, thereby terminating the agreement and any obligation to arbitrate that we may have under it." [2] These "window dressing" claims were based on the eruption of "violent riots in Curacao" with the "business areas of Willemstad . . . in flames" and the riots being directed "immediately against foreign interests," etc.

The arbitration proceeded without Solitron's participation, but Solitron was duly informed at all times of the time and dates of hearings and the other procedures followed. The award was made and signed by the arbitrators in Curacao on August 13, 1970, and in substance, as the district court pointed out, 356 F. Supp. at 8, was in favor of Curacao's position but by no means accepted all of the claims of Curacao as to damages. Thus, while the arbitrators found that Solitron was in breach of contract by omission to lease the completed buildings, they also found that Curacao could not recover as damages its 1,521,000 Netherlands Antilles guilders (NAfls) investment costs in respect to the buildings, although they did allow 53,602 Nafls as the cost of an acid neutralization plant because it was intended uniquely for Solitron. On the theory that it was virtually certain that Curacao could not find another lessee before July 1, 1971, at the earliest, the arbitrators allowed 192,482 NAfls for loss of rent on the two buildings for the period from December 1, 1969, to July 1, 1971, and

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a small amount as damages on account of fire insurance premiums paid.

The only item that really is complained about by Solitron in its brief, and which strikes us as unusual, is the award of 375,000 NAfls as reflecting the present value discount of an award of 423,671.35 NAfls for the period December 1, 1970, to December 31, 1973, as damages for Solitron's failure to create 100 jobs as agreed. The basis of this award was that Curacao would have had 100 more unemployed in the period than otherwise and, under its laws, Curacao had to pay unemployment benefits and medical assistance to these unemployed persons. This award was computed by using 1969 statistics, with percentage increases for later years as could be expected. In turn, the unemployment benefits payable were computed on the basis that, of the 1,000 registered unemployed seeking a job with Solitron, some 75 per cent were "breadwinners with dependents," 10 per cent were "breadwinners without dependents," and 15 per cent were "non-breadwinners." Under Curacaoan law in 1969 apparently, "breadwinners" were entitled to 800 NAfls "financial assistance" and "non-breadwinners" were entitled to none, but each "breadwinner" and each dependent was entitled to 175 NAfls by way of "medical assistance."

Expenses to the amount of 90,000 NAfls covering foreign travel to establish industries regarding the buildings were allowed, but Solitron was granted an overall set-off for the value of its structural steel and air conditioning plant to the extent of 266,424.05 Nafls. The arbitrators rejected a claim for the costs of prosecuting the arbitration but awarded interest and, as the orignal contract provided, one-half of the fees and expenses of the arbitrators. The arbitrators disallowed any claim of Curacao for damages for Solitron's failure to establish 3,000 jobs by January 1,

1974, on the ground that it "depends on so many factors at present entirely unknown and not readily predictable," even on the basis of expert advice, but left this question open for future submission. Similarly the arbitrators made no allowance for damages for failure to create the original 100 jobs beyond December 31, 1973, on the basis that it was not known whether there would be "structural unemployment" after January 1, 1974. As the district court found, "The award gives every indication of able, careful, and impartial work by the arbitrators." 356 F. Supp. at 10.

As the district court also found, after the award was made the law of the Netherlands Antilles was fully complied with in terms of filing the award, Curacao seeking the issuance of a "writ of execution" on the basis of the award, which was declared enforceable in the "Court of First Instance." While Solitron had the opportunity to take advantage of the provision in the Antilles law to bring an action to annul the arbitral award within three months from the filing of the award in court, it did not exercise it. The award and the judgment entered thereon were, as the district court held, final under the law of Antilles and a marshal "served" by mail to Solitron a writ based upon the award and judgment in Curacao. The district court went on to hold that objections by Solitron on the basis of lack of jurisdiction were frivolous because it had agreed in the original agreement to submit to arbitration in Curacao and that the laws of the Antilles should be applicable and, indeed, had agreed that it had a domicile in Curacao and an irrevocable agent for service of notice and process there. In this respect the district court was clearly correct. *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315-16 (1964); *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268, 1276-77 (2d Cir. 1971); *Gilbert* v. *Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931).

Neither the jurisdictional point, nor that one of the arbitrators was a judge of a court in Curacao and hence was not impartial as a matter of law, is urged here. Rather, Solitron claims that the arbitral award is not enforceable under the Convention on Recognition and Enforcement of Arbitral Awards (Convention on Recognition), as implemented in 9 U.S.C. § 201 *et seq.*, for the following reasons: (1) the construction of an industrial park is a "governmental" and not a "commercial" function, so that the Convention does not apply; (2) the arbitration award is not final and definite and is contrary to the public policy of the United States; and (3) the contract and the arbitration agreement terminated by reason of impossibility and, as a result of this termination, there was lack of jurisdiction in Curacao over Solitron. The claim is also made here, as it was below, that the judgment on the arbitral award is not enforceable under Article 53, the New York statute, because the Convention on Recognition and its implementing legislation have preempted the New York statute and because, under the terms of the New York statute as it has been construed, enforcement is not permitted here. In its reply brief Solitron also argues for the first time that the whole matter is governed by the Convention on the Settlement of Investment Disputes between states and nationals of other states which was ratified and adhered to both by the United States, [1966] 1 U.S.T. 1270, TIAS No. 6090, and the Netherlands, [1966] 1 U.S.T. 1355; 55 U.S. State Dept. Bull. 596 (1966).[3]

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We deal first with the question under New York law, whether the foreign judgment is enforceable.[4] The first question is whether Article 53, permitting the enforcement of a foreign money judgment, has been preempted by the overrriding federal law implementing the Convention and relating to the enforcement of foreign arbitral awards, 9 U.S.C. § 201 *et seq.* The Convention on Recognition in no way purports to prevent states from enforcing foreign money judgments, whether those judgments are rendered in the enforcement of an arbitration award or otherwise. This is not to say that Solitron's argument is not, indeed, ingenious, since it apparently was not made in the sole case decided under Article 53 or any prior thereto in which the courts of New York State have granted enforcement to foreign judgments based upon foreign arbitration awards, arising after the United States Senate's ac-

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cession to the Convention, albeit with reservations, on October 4, 1968, and the adoption by the Congress of 9 U.S.C. ch. 2 on July 31, 1970.[5] *New Central Jute Mills Co.* v. *City Trade & Industries, Ltd.*, 65 Misc. 2d 653, 318 N.Y.S. 2d 980 (Sup. Ct. 1971).[6]

It is not insignificant that the Federal Arbitration Act itself makes a very clear distinction between action on an award and action on a judgment enforcing the award, pointing out that application for an order confirming the award may be made only when "the parties in their agreement have agreed that a judgment of the court shall be entered upon the award . . ." and on certain other conditions, subject to certain other qualifications. 9 U.S.C. § 9.

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This very important difference was, indeed, the key to our own recent decision in *Varley* v. *Tarrytown Associates, Inc.*, 477 F.2d 208 (2d Cir. 1973), where we held that, because the parties in their contract to arbitrate had not agreed that a judgment of the court could be entered upon the award, there was no consent to the entry of judgment thereon. We hold, then, that, since the Convention on Recognition itself and its enforcing legislation go only to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards, New York state law is not preempted to the extent that it permits, regulates and establishes a procedure for the enforcement of the foreign money judgment. Thus it cannot be doubted that the policy of New York State to recognize foreign judgments "prevails in the absence of interference with the federal regulatory scheme." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 42 U.S.L.W. 4021, 4028 (U.S. Dec. 4, 1973).

It remains then to be seen whether under New York law the Curacaoan judgment may be enforced and, in this respect, it is helpful to recall, *see* note 6 *supra*, that Article 53 itself represents a codification of pre-existing common law on the subject. Thus, for example, the district court was plainly correct in its holding, not contested on appeal, that a claim of fraud in the inducement of the contract generally—alleged here on the basis of supposed representations that the wage structure in Curacao would remain stable—is a question for the arbitrators. *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967); *Weinrott* v. *Carp*, 32 N.Y.2d 194, 298 N.E.2d 42, 344 N.Y.S. 2d 848 (1973). This carries with it as the district court quite properly held the claims that the contract itself terminated or was frustrated by virtue of the changes in wage rates in Curacao and legislation changing the minimum wages for non-electronic industry

employees as well as by the supposed riots and change in personnel of government.[7]

We thus turn to the other points on the basis of which the appellant claims that under New York law and under Article 53 enforcement of the Curacaoan judgment would not be granted. Concededly one of the bases on which New York would not enforce a foreign judgment would be if it were made without jurisdiction. NYCPLR § 5304(a)2. Appellant argues that jurisdiction over it ended in March of 1970, but the basis for this argument is that the contract terminated as a matter of law by reason of impossibility of performance, and this again goes to the change of the minimum wage law imposed by Curacao. The March, 1970, date for "termination" is based upon Solitron's counsel's self-serving letter of May 15 to the effect that performance had by then become economically impossible. We would point out again that this was, under the broad arbitration clause, initially a question for the arbitrators and was ruled upon and rejected by them. There is nothing in the contract to indicate that Solitron's obligations were predicated on the continued existence of any particular wage rate. Only recently the Fifth Circuit held in *Eastern Marine Corp.* v. *Fukaya Trading Co.*, 364 F.2d 80, 84-85 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966), that, as a matter of federal substantive law, an arbitration clause survives the frustration of a contract for the purposes of settling, among other things, whether the contract has in fact been frustrated. *See also Heyman* v. *Warwins*, [1942] A.C. 356, 366, relied upon by Judge Augustus Hand in *In*

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re Pahlberg, 131 F.2d 968 (2d Cir. 1942); *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co., supra. In re Kramer & Uchitelle*, 288 N.Y. 467, 43 N.E.2d 493 (1942), heavily relied upon by appellant for the proposition that, at least as a matter of New York law, a proceeding to enforce an arbitration contract presupposes the existence of a valid and enforceable contract at the time the remedy is sought, has been limited. *In re Exercycle Corp.*, 9 N.Y.2d 329, 335-36, 174 N.E.2d 463, 465-66, 214 N.Y.S.2d 353, 356-58 (1961), to the situation in which public policy as embodied in a statute forbids the performance which is the subject of dispute, a policy and statute which are as binding upon the arbitrators as upon the courts. That, of course, is not the situation here, where the defense of frustration is one asserted purely as a common law contractual defense.

On its jurisdictional point, Solitron also argues, however, that its contractual concession of jurisdiction on the basis of the provision that it "invariably" or irrevocably chose domicile at the offices of its attorney-notary public in Willemstad cannot of itself be sufficient. The argument is not that its consent to jurisdiction was revoked, and indeed could not be because Curacao had already invoked arbitration under the agreement by the time of Solitron's attempted revocation of its consent to jurisdiction on May 12, 1970. Rather, the Solitron argument is to the effect that the document in the nature of a "marshal's writ," which was issued after the "Court of First Instance" "declared executed" the "arbitral verdict," contained language to the effect that "respondent [Solitron] is no longer domiciled in the Netherlands Antilles," and that this language represents a concession on the part of Curacao that Solitron's domicile terminated no later than March, 1970. There are at least three answers to this argument:

1. If Solitron's domicile had terminated in March of 1970, why did it wait until May 12, 1970, to cable its agent

for service of process to revoke "such authority if any as you may still retain to represent us," confirming this by cable and letter dated May 13, 1970[1]

2. Solitron's attempt to claim that its domicile was terminated because of impossibility of performance assumes, incorrectly, that it, rather than the arbitrators, had the power to decide that issue, a matter which we have already held adversely to Solitron above.

3. The language of the Curacaoan marshal's writ in context at most constitutes an acknowledgment of the fact that the attempted revocation in May of 1970 had become effective by the date of the marshal's writ in April of 1971 (a matter which we need not and do not affirmatively decide here). That is to say, the marshal's language to the effect that the respondent is no longer domiciled in the Netherlands Antilles relates to the time of the issuance and presentation of the writ in April, 1971.

Appellant argues strenuously, and on two different bases, that—to the extent that the arbitral award consists of damages in lieu of welfare payments that Curacao would have had to make as a result of Solitron's breach of the obligation to create 100 jobs—the award is unenforceable and, therefore, a judgment based upon it is unenforceable under New York law.[8] These two bases urged are, first, that New York will vacate an arbitral award if the arbitrators' construction of a document is "completely irrational." *Lentine* v. *Fundaro,* 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635, 328 N.Y.S.2d 418, 422 (1972). The other is that there are some matters, such as the custody of children, *Hill* v. *Hill,*

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199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct. 1951), and the distribution of decedents' estates, *Swislocki* v. *Spiewak*, 273 App. Div. 768, 75 N.Y.S.2d 147 (1st Dep't 1947), *leave to appeal denied*, 273 App. Div. 808, 76 N.Y.S.2d 269 (1948), which are simply not subject to arbitration under New York law. It is Solitron's point that Solitron did not accept a delegation to it by Curacao of the "sovereign duty to provide social welfare payments to any part of the unemployed on the island." But this, of course, entirely misses the point that what the arbitrators were doing—and in a very cautious way they did it, with basis in fact—was attempting to fix damages for the purpose of ascertaining the extent of Solitron's liability for breach of its conceded obligation under the agreement to create 100 jobs. While an American court in similar circumstances, or an American board of arbitrators, might not necessarily follow the same route, in ascertaining damages, here it must be remembered that this was obviously an underdeveloped country with a large number of unemployed; indeed the basis of the award was that there were 1,000 unemployed people seeking the 100 new jobs with Solitron and there was expert testimony by the head of the unemployment service of the Island Territory adduced before the arbitrators that for 1969 the Island Territory would have had to pay in respect to those employees sums pursuant to its laws relating to financial and medical assistance, the sums varying as above pointed out. It may be that the arbitrators improperly assumed that the same payments by way of financial aid had to be made for 1970 and 1971, 1972 and 1973, and indeed pursuant to the expert testimony the arbitrators took into account a 10 per cent increase for "financial assistance" and 6½ per cent for "medical assistance." The arbitrators' findings were also based upon "the expected increase in population, the time required for preparing for the establishment of new

businesses and the extent of the structural unemployment existing in Curacao." Any objections to this method of computing damages or to the assumptions made by the arbitrators could have been presented to them or, indeed, might well have been presented in judicial proceedings which could have been brought by Solitron to annul the arbitration award in Curacao. They come too late here, however, and they by no means take into account the proposition to the contrary—which we need not pass upon—that, by virtue of the institutional nature and commercial relationship of the parties, remembering that Curacao itself was a government with large numbers of unemployed people, the method of ascertaining damages may well have been a fair and proper one. Solitron points to no New York statutory law that adopts a policy contrary to that agreed to by the parties here in their contract and implemented by the arbitrators. In this posture, Solitron's argument under state law must fail, *see In re Exercycle Corp., supra; New Central Jute Mills Co.* v. *City Trade & Industries, Ltd., supra,* in this concluded arbitration proceeding. *Cf. Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.,* 274 F.2d 805, 808 (2d Cir.), *cert. denied,* 363 U.S. 843 (1960).

The next argument by appellant is that it is contrary to the public policy of New York to permit a person to derive an advantage from his own wrong, *see Riggs* v. *Palmer,* 115 N.Y. 506, 22 N.E. 188 (1889), and violation of New York public policy is a ground for refusing to enforce the Curacaoan judgment under NYCPLR § 5304(b)4. The claim is, once again, that Curacao is attempting to take advantage of its own wrong in that it altered the prevailing wages after having induced Solitron to establish a plant on the basis that the wage rates would be stable so that Solitron would be in a competitive position with other "offshore" manu-

facturers of semi-conductors. While undeniably Curacao had the power to fix wages, Solitron says, the power to hold Solitron in breach of an agreement after Curacao had made it "impossible" for it to perform the agreement is something else again. Of course, this is just another way of restating the same argument which was rejected factually by the district judge. In the light of the papers submitted we cannot help but agree with Judge Wyatt. There was clearly no representation or warranty in the agreement itself that the wages would remain stable. This may well have been Solitron's hope and, indeed, this conceivably may have been the hope of the Curacaoan government— though it could be doubted—at the time the contract was entered into. But it is absurd to suppose that a sophisticated American manufacturer would expect a 45-cent an hour wage rate to last indefinitely on the Island. In no way, despite more than adequate legal advice, did Solitron attempt to make the wage-rate factor one of the terms or conditions of the agreement. It is interesting to note that the arbitrators considered this argument as having been put forth—despite Solitron's failure to participate in the arbitration—by Solitron's counsel by letter to the Island Territory of May 15, 1970. The arbitrators conceived of it as a defense amounting to a plea of mistake as to the identity of the thing contracted for, and they indicated that under the law of the Netherlands Antilles such a mistake may lead to judicial annulment of the contract in question, but only when there are both reasonable grounds for believing that the party under the mistake would not have entered into the contract had he known the circumstances assumed to be present was in fact absent, and that the other party, in this case Curacao, ought to have realized that the presence of the circumstance—here the low wage rate—was the real reason for entering into the contract. As the arbitrators themselves pointed out, "that the wage level prevailing at the time of

concluding the Agreement was attractive to Solitron is understandable; but it is quite unacceptable that, *on the basis of that wage level,* Solitron could have felt able to commit itself to operating a business for twenty years, let alone that the Island Territory ought to have realized this." Apparently witnesses testified before them to the effect that indeed no assurance was given that the low wages would be maintained or that Solitron would not have to deal with labor unions. The finding of the arbitrators certainly seems sound on the basis of our independent review of the documents and affidavits submitted to the court below, as it did to the district court itself. It is absurd to think that, if the maintenance of the wage rate were a condition or term of the agreement, it would not have been incorporated into the agreement by way of warranty, covenant or otherwise in light of the fact that Solitron was in a perfectly strong bargaining position, well represented by skilled and learned counsel, with presumably sophisticated and worldly business management at the helm. We see nothing to justify the claim that Curacao was "deriving an advantage from its own wrong." Higher wage rates, whether or not as a result of the change in governmental personnel (and there is no indication that the government as such was overthrown), and whether or not as the result of agitation, were a business risk that Solitron took; it ill behooves the company now to claim otherwise.

The last point made in reference to the Curacaoan judgment is that under NYCPLR § 5302 only a final and conclusive judgment may be enforced in New York. The judgment, it is claimed, is not conclusive or final since the arbitration award left it open to either party, after January 1, 1974, to demand further arbitration and possibly to obtain further and more extensive damages. But this is a point that was not raised before the Curacao

courts. By the very terms of the New York statute, the question before us, as it would be before a New York court, is whether the judgment obtained in Curacao is "final . . . where rendered." NYCPLR § 5302. We have already noted that the potential for appellate review of the award in the courts of Curacao ceased when Solitron failed to seek such review within three months of the award. Logic would seem to compel the conclusion, as the district court found, that the judgment rendered on the award in Curacao would be viewed in Curacao as "final" and Solitron presents no evidence to the contrary. Indeed, it is still open to the appellant to raise the question whether further damages may be awarded in the event that further arbitration or confirmation of another arbitral award is sought in the courts of the Netherlands Antilles. For all we know, those courts may very well take the view that any claim for breach of the contract, whether pertaining to present, past or future damages, must be made and proved with sufficient particularity at the time of the arbitration, in the absence of which the party seeking damages for breach of contract will be precluded. The courts of Curacao may, as a matter of Netherlands Antilles law, take the position that the breach of contract was merged in the arbitration award, the arbitration award merged in the judgment, and that any further arbitration is not permissible. *See* note 4 *supra*. They may take quite the opposite view, of course, and we are not ourselves sufficiently versed in the law of the Netherlands Antilles, nor have the parties attempted to aid us in this respect, that we can with any assurance predict what the Curacao courts will do. We must recognize that the judgment itself is definite in amount, was conclusive and enforceable in Curacao, and, indeed, is final to the

extent that it specifies precisely what Solitron is to pay; nothing remains to be calculated.[9]

Thus we conclude that the judgment of Curacao was enforceable under Article 53 of the New York Civil Practice Law and Rules and affirm the district court on this ground. In so holding we need not determine the correctness of the alternative ground advanced by the district court that the arbitration award was independently enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, by virtue of 9 U.S.C. § 201 *et seq.* The argument that Solitron may counterclaim for its investment in Curacao is absurd, since credit was already given for this in the arbitral award.

Judgment affirmed.

(See footnotes starting at page A 21.)

Footnotes to the Opinion of the Court of Appeals

[1] In short, the arbitration clause was of the broadest type, reserving no issues for resolution in the first instance by any tribunal, judicial or otherwise. *See generally* Note, *The Consequences of a Broad Arbitration Clause Under the Federal Arbitration Act*, 52 B.U.L. Rev. 571 (1972).

[2] This claim can be read as an allegation of fraud in the inducement to the contract or as "impossibility" of performance of the contract due to the acts of one party, Curacao, to the contract. On appeal, Solitron has chosen to characterize the question along "impossibility" lines in order to avoid the inescapable impact of *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397 (1967) (fraud in the inducement is a matter to be determined by the arbitrators), should the case be disposed of under the Federal Arbitration Act.

[3] This afterthought we find to have no merit whatsoever, since the Convention in its preamble points out that it applies only where there is "mutual consent by the parties to submit . . . disputes to conciliation or to arbitration through . . . facilities" established under the Convention and the jurisdiction of the "International Center for Settlement of Investment Disputes" constituting such facilities under Article 25 of the Convention, [1966] 1 U.S.T. 1280, only extends to "any legal dispute . . . which the parties to the dispute consent in writing to submit to the center . . . ." That is to say, this Convention, which operates under the auspices of the International Bank for Recovery and Development, is purely a voluntary device for arbitration and is by no means intended to preclude other forms of arbitration or settlement of international disputes, investment or otherwise.

[4] We need not deal with the question—not argued by the parties and not touched upon in the briefs—whether the action on the arbitration award was merged in the Curacaoan judgment. *See* Restatement of Judgments § 47. *See also Pepper* v. *Bankers Life & Casualty Co.*, 414 F.2d 356 (8th Cir. 1969). This would presumably be a matter of Curacaoan law in the first instance. *See* Restatement (Second) of Conflict of Laws §§ 218, 187 (2) & 188. By first addressing ourselves to the question whether or not the Curacaoan judgment confirming or enforcing the award is enforceable *qua* judgment, we avoid the question—raised implicitly, if not directly by the appellant—whether the cause of action or, more particularly, the nature of damages awarded for breach of the covenant to create jobs by way of equating such damages with welfare payments that

Footnotes Continued

are required to be paid in Curacao, is so contrary to the strong public policy of the forum—a question which we need not decide and on which we express no opinion—that the award might not be enforceable *qua* award (whether under the Federal Arbitration Act or otherwise). *Cf. Benton* v. *Singleton*, 114 Ga. 548, 40 S.E. 811 (1902) (gambling contract).

[5] For some of the legislative history in connection with the adoption of 9 U.S.C. Ch. 2, *see* H.R. Rep. 1181, *reprinted in* 1970 U.S. Code Cong. & Ad News 3601 *et seq.* The Committee points out that "so far as is known, there is no opposition to the bill" and "in the Committee's view, the provisions of S. 3274 will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts." *Id.* at 3602. The Committee, of course, recognized the obvious distinction between an award as such and the enforcement of an award, whether in a United States or foreign court, and to that extent, at least, appears to recognize the distinction between suing on the award and suing on a foreign judgment confirming or enforcing the award. It would appear that the Convention itself, and the United States enabling legislation, is addressed to the situation in which there may not be jurisdiction over the United States person or corporation for purposes of awarding a foreign judgment even though there may be jurisdiction for the making of a foreign arbitral award.

[6] Article 53 was principally a codification of pre-existing New York case law permitting the enforcement of foreign country money judgments. *See* Judicial Conference Report, 2 McKinney's Session Laws of New York 2784 (1970). There were a number of decisions of the courts of New York granting enforcement to foreign judgments based upon foreign arbitral awards. *See, e.g., Gilbert* v. *Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931); *Johnston* v. *Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926); *Coudenhove-Kalergi* v. *Dieterle*, 36 N.Y.S.2d 313 (Sup. Ct. 1942); *von Engelbrechten* v. *Galvanoni & Nevy Bros.*, 59 Misc. 2d 721, 300 N.Y.S.2d 239 (Civ. Ct. 1969).

[7] The same argument might be rejected on the basis that Curacao having acted by granting judgment on the arbitral award was engaged in an act of state which, under *Banco Nacionale de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), and related cases, we should not and indeed may not go behind to determine the validity of the judgment or whether we should give credit to it. *See* Restatement (Second) of Foreign Relations Law of the United States § 41.

Footnotes Continued

[8] We emphasize that whether the award would be enforced under New York law, a question not before us here, and whether the judgment would be recognized under Article 53 are entirely separate and distinct questions. Indeed, some of the arguments advanced by Solitron with respect to New York "policy" might well be persuasive were this an action to enforce the award under New York law.

[9] Should the arbitrators in a subsequent proceeding decide that further damages are warranted, and should appellee have to bring another action in a federal court to enforce the judgment on such an award, a federal court would then be in a position to gauge the "finality" accorded to the instant judgment by the courts of Curacao. What Solitron asks us to do here is to look behind the present judgment and either deny its recognition or resolve in its favor the question whether Curacao will be entitled to recognition of a hypothetical judgment for future damages; the time is simply not ripe for such a determination. Even were we to take the view that future proceedings in Curacao might lead to "modification" of the present judgment, our concern would be limited to due process considerations:

> considerations of due process probably require that enforcement be refused to the extent that modifications could be sought in the rendering jurisdiction, unless the requested court allows the defendant to litigate the issues which would entitle him to modification.

von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1658 (footnote omitted). *Cf. Griffin* v. *Griffin*, 327 U.S. 220 (1946).

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

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WYATT, District Judge,

This is a motion by petitioner The Island Territory of Curacao (Curacao) for an order confirming an arbitration and enforcing a judgment.

Curacao is a political entity which is part of the Netherlands Antilles, which in turn is a separate political entity and a part of the Kingdom of the Netherlands.

Respondent Solitron Devices, Inc. (Solitron) is a New York corporation with its principal place of business in Rockland County in this District. Solitron makes and sells semiconductor devices for the electronics industry.

Opinion

The award was made by three arbitrators at Willemstad in Curacao on August 13, 1970. Solitron did not participate in the arbitration. The award was in favor of Curacao and, among other things, directed Solitron to pay to Curacao some 445,000 guilders (the local currency; something over $250,000), with interest and costs. The award was "deposited" at the Registry of the Court of First Instance in Curacao and on August 14, 1970 a Judge of that Court issued a "writ of execution" which declared that the award was "enforceable".

On February 10, 1972, Curacao filed in this Court a petition "to confirm arbitration award and to enforce the judgment entered thereon". Curacao then caused service to be made on Solitron of the summons and petition and also of notice of the present motion (the exhibits described in the petition are in fact annexed to the motion papers).

The petition invokes the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", the enforcement of which is provided for in Chapter 2 (§§ 201-208) of Title 9 of the Code. Jurisdiction seems clearly conferred by 9 U. S. C. § 203; diversity jurisdiction is also asserted. There is a "related claim" based on New York law, specifically, CPLR Article 53 (§§ 5301-5309), "Recognition of Foreign Country Money Judgments".

Solitron filed an answer asserting many defenses and with a counterclaim for money damages.

The matter was pending before Judge McLean at the time of his death, was thereafter reassigned to me, and duly came on to be heard.

1.

A written agreement was executed in triplicate in Curacao on January 12, 1968. Solitron and Curacao were parties; the Netherlands Antilles, the government entity for all the Dutch islands in that area and referred to in the agreement as the "Central Government", was also a party. (The geographical

area and the government entity of Netherlands Antilles will sometimes be referred to simply as the "Antilles".) The agreement was apparently in Dutch. A translation is part of the moving papers; Solitron has submitted nothing to cast doubt on the accuracy of this translation; a certain awkwardness is noticed as to a few of the words in translation.

The aims of the parties are evident. The principal competitors of Solitron had been manufacturing their devices "offshore", outside the United States, "in places where labor is available . . . at far less than prevailing wage rates in the United States." (Friedman opposing affidavit, p. 1) There was "heavy price competition" in the industry, "pressures on Solitron mounted" (Friedman, pp. 1, 2), and Solitron believed a plant in Curacao would give it the needed advantages. On their part, Curacao and Antilles wanted to attract industry to the islands and thus to create jobs. There were no representations in the agreement, however, as to wage rates—past, present, or future—or as to anything else.

Curacao had initiated the contact with Solitron, whose President "expressed interest in locating a manufacturing facility in Curacao" (Friedman, p. 2). The negotiations for the agreement then took place in Curacao. Solitron's president was in Curacao in August 1967 where he met "all of the top governmental and judicial officials of the island" and "many of its business leaders and bankers" (Friedman, p. 2). He was there again before and at the signing of the agreement and undoubtedly Solitron had counsel in Curacao for all needed advice.

The agreement goes into some detail but for present purposes only the principal provisions which affected the award need be outlined.

Curacao set aside ("destines" is the word used in the translation) for an industrial park about 60 acres near the airport (Art. 1).

Curacao agreed to construct two factory buildings in the park, one ("the larger") of about 30,000 square feet and the

other ("the smaller") of about 20,000 square feet. These are to be built according to plans submitted by Solitron and approved by Curacao. Presumably the buildings were to be erected at the expense of Curacao, but there is a statement that when the plans are approved, "a written agreement shall be concluded" between the parties specifying what costs were to be for Curacao and what for Solitron. (Art. 9) Presumably such an agreement was made because, as will later appear, Curacao did in fact bear many expenses and Solitron did in fact send in a substantial amount of material for the buildings.

Curacao agreed to build an access road to the park and other roads within the part up to the building sites (Art. 8). Curacao agreed at its expense to lay pipes to supply the park with distilled sea water (Art. 5).

The two buildings were required to be "delivered" within 12 months of approval of the plans and to be leased "forthwith" to Solitron for 20 years at a rent, the amount of which was specified (Art. 9). It was agreed that Solitron would operate in the larger building and could use the smaller building also or could sublease it.

Solitron agreed "to put its electronic manufacturing industry into operation" within 12 months of delivery of the larger building and "shall create" at least 100 jobs (presumably within the 12 month period). (Art. 3)

Solitron agreed that before January 1, 1974 it would establish (presumably in the park) "manufacturing industries" which, with Solitron's own employment, would provide employment for at least three thousand (3000) persons born in the Netherlands Antilles . . . ". (Art. 3)

It was provided that "the laws of the Netherlands Antilles shall be applicable" (Art. 12).

There were detailed provisions in Article 12 for arbitration of any dispute between the parties. Since these provisions are

of significance to the present motion, it may be well to quote them in full:

> "2a. All disputes arising between the CENTRAL GOVERNMENT and/or the ISLAND GOVERNMENT, and SOLITRON as a consequence of or in connection with the present agreement or further agreements for the implementation of the present agreement, legal as well as factual, shall be submitted to a board of arbitration. The decision of this board shall be binding on all parties involved in the dispute.
>
> "b. A dispute shall be considered to exist if one of the parties notifies the other party by registered letter that he is of opinion that such is the case. In the case of such a dispute each of the parties shall appoint an arbitrator and both arbitrators so designated shall jointly appoint a third one. Should one of the parties or both parties not designate an arbitrator within one month or should both arbitrators not reach an agreement on the choice of the third arbitrator, then the third arbitrator shall at the request of the willing party be appointed by the President of the Court of Justice of the Netherlands Antilles.
>
> "c. The arbitrators shall have to render an award within four months after the day on which the third arbitrator has accepted his appointment.
>
> "d. The arbitrators shall judge and give an award like good men and true, taking into account that which has been stipulated by contract between parties without being bound by rigid rules of the laws of the Netherlands Antilles. The procedure with respect to the settlement of the dispute shall be determined by the arbitrators.
>
> "e. The fee due to the arbitrators shall be borne by the CENTRAL GOVERNMENT and/or the ISLAND GOV-

ERNMENT, and SOLITRON, on a fifty/fifty basis. All other costs arising from the arbitration shall be chargeable to the party found to be in error. The arbitrators are entitled to set off these costs against each other wholly or partially, should both parties be found to be partially in error."

Finally, there was a provision which reads as follows:

"*Article 13*

SOLITRON shall invariably choose domicile for everything pertaining to the execution of the present agreement and further agreements made for the implementation or supplementation of the present agreement, as well as for all acts of judicial execution at the office of notary-public Mr. E. L. Joubert, Kerkstraat 11A, Wilemstad, Curacao."

The word "invariably" seems to be a poor translation. According to counsel for Curacao, the Dutch word "onveranderlijk"; this same word is also used in the award (Exhibit I, p. 1) and is there translated "irrevocably" (Exhibit J, p. 1). The meaning conveyed, even by "invariably", is that Solitron submits itself to the jurisdiction of Curacao and designates, without power of change, a resident of Curacao as its agent on whom notice or process can be served.

It seems that the local resident agent of Solitron, Notary Public Joubert, was in fact the attorney in Curacao for Solitron.

2.

From the papers submitted (other than the arbitration award), it is not clear what happened between the execution of the agreement on January 12, 1968, and the initiation of arbitration by Curacao on April 13, 1970. For purposes of the present motion, this is of no moment. Some things do appear

from the papers without any serious dispute and, at least for background, it may be well to mention them.

Solitron did submit plans for the two buildings and the plans were approved.

Solitron shipped to Curracao structural steel, air conditioning and other equipment, and work tables; this was for the two buildings and Solitron says it was "worth" $221,855 (this is the subject of Solitron's counterclaim).

The two buildings were completed and, except for the material shipped in by Solitron, was at the expense of Curacao. When the buildings were completed, does not appear; on April 13, 1970, the Lieutenant Governor stated flatly: " . . . we completed the two factory buildings at an expense to us of NAf. [local currency] 1,500,000".

In May 1969 and for a time thereafter, widespread disorders occurred in Curacao, probably caused by underemployment, low wages and social unrest. Government did not break down, but there was some change in government personnel and policies. As one of the new policies, there was a new minimum wage law which, according to Solitron, "immediately raised minimum wages by two and one-half times" (Friedman, p. 4).

The new minimum wage law caused Solitron to lose interest in Curacao and in the agreement; it determined that it would not carry out the agreement. As counsel for Solitron later and frankly put it: "The new wage rate destroys the economic advantage of manufacturing in Curacao".

The president of Solitron was in Curacao in November 1969, apparently attempting to get out of the agreement.

A lease on the two completed buildings was offered to Solitron in accordance with the January 12, 1968 agreement. Solitron refused the lease. This seems to be established by the papers and in any event to be evident. The position of Solitron in its pleading is in this respect puzzling.

Opinion

The petition of Curacao alleges:

> "8. Thereafter, the two factory buildings required to be constructed by the Agreement were in fact built by Curacao. Despite this, Solitron refused to enter into a lease agreement and perform other obligations imposed upon it by the Agreement."

The answer of Solitron does not mention this paragraph 8 and does not specifically admit or deny its averments. Apparently Solitron intends to cover paragraph of the petition by a general denial in paragraph 1 of its answer. It is difficult to see how Solitron can deny that it refused to enter into a lease, whatever its excuses may be. Refusal to enter into a lease was and is the critical issue in the dispute. It is also difficult to see how Solitron can deny that the buildings were completed; Solitron does not say that it is without knowledge or information sufficient to form a belief as to the truth of the averment that the buildings were completed; it denies outright that the buildings were completed. Yet later in the answer Solitron avers (para. 81) that Curacao "has leased to third persons the premises which it agreed to lease to Solitron".

On April 13, 1970, Curacao sent to Solitron in care of its agent in Curacao a written notice of dispute and of the invocation of arbitration. Curacao appointed as its arbitrator Dr. de Haseth. It does not appear what is the business or profession of Dr. de Haseth.

Evidently Solitron received the notice. On May 12 and May 13, 1970, Solitron sent cables to its resident agent in Curacao, named in the agreement, which agent was also its attorney there. The cables purported to revoke the authority of the agent "to represent us" (annex to Friedman affidavit). The agreement, however, does not permit any such revocation. Under date of May 15, 1970, New York counsel to Solitron wrote to Curacao declining to proceed to arbitration.

Opinion

When Solitron failed to designate an arbitrator within the time provided in the agreement, Curacao asked the President of the Court of Justice of Antilles to make the appointment. The President on June 9, 1970 appointed Dr. Schoordijk, who is a professor (of what does not appear) at the University of Tilburg, a city in the southern part of the Netherlands. Notice of this was given to New York counsel for Solitron.

The two arbitrators then appointed a third arbitrator, Dr. Ariens. At the time, Dr. Ariens was a "substitute member" (probably similar to a "senior judge" in the federal courts) of the Court of Justice of the Antilles and had formerly been President of that Court.

By cable on July 1, 1970, Dr. de Haseth advised Solitron at its principal place of business in Rockland County of a schedule for submission of statements by the parties (in English, if desired) and of a hearing to be held on Monday, August 11, 1970 (evidently this was a typographical error; August 11, 1970 was a Tuesday). Under date of July 9, 1970, Dr. de Haseth confirmed this by letter to Solitron in Rockland County and also advised of the appointment of the second and third arbitrators and of their professional backgrounds.

By letter dated July 23, 1970, Dr. de Haseth advised Solitron of the appointment of Dr. Ariens as Chairman and of the appointment of a Secretary.

By letter under date of August 3, 1970 to Solitron in care of its agent in Curacao, the Secretary advised that the hearing would be on August 10, 1970 at 0900 in the Chamber of Commerce Building in Curacao and summoned Solitron to appear then and there. A similar advice was sent by letter dated August 4, 1970 to Solitron in Rockland County.

4a.

The arbitrators met on August 10, 1970 and conducted a hearing, Curacao being there represented. Documentary evi-

dence was received. On the same day, the arbitrators visited the industrial park wherein the factory buildings were located "to take stock of the configuration of the terrain" (Award, p. 5; references to the award are to the English translation, physically a part of the motion papers but described in the petition and recited to have been annexed thereto). The arbitrators heard witnesses on August 11 and 12, 1970 and drew up a report of their testimony.

Solitron ignored the arbitration completely; it did not attend any hearing and submitted nothing to the arbitrators, in writing or otherwise.

The award was made and signed by the arbitrators in Curacao on August 13, 1970. The award is said to be made "ex aequo et bono". This expression probably has no bearing on the present motion but its meaning can be determined.

A translation of relevant parts of the arbitration law of the Antilles is part of the moving papers. That law is sometimes referred to herein as simply "the law", where the context points to the law of the Antilles.

The law provides that a "reward" (evidently a typographical error for "award") is to be made "according to the law, unless the compromise has granted them the power to judge as good men in accordance with the principles of equity". It is assumed that "compromise" is a poor translation for "agreement".

It would appear that the provision in the January 12, 1968 agreement that the arbitrators shall "give an award as good men and true" was intended to authorize them "to judge as good men in accordance with the principles of equity".

The use by the arbitrators of the expression "ex aequo et bono" is believed to indicate that the arbitrators acted under the authority just described. "Ex aequo et bono" comes from the civil law and means, among other things, "according to equity and conscience" (Black's Law Dictionary (4th ed.) 659).

Indeed, the word "equity" comes from the Latin "aequus" ("equal").

4b.

The award was in favor of Curacao, but the arbitrators did not accept all the points of Curacao, rejecting important items of damages.

The arbitrators found that the date of completion of the buildings was December 1, 1969 (p. 15; references are to pages of the English translation in the moving papers); that in negotiations thereafter between the parties about the lease Solitron never objected to December 1, 1969 as the date when the lease should begin (p. 12); that an offer of lease of the two buildings had been made to and refused by Solitron (pp. 5-7); and that this was a breach of contract for which Solitron was obliged "to pay compensation" (p. 7).

While Solitron boycotted the arbitration proceeding, the arbitrators nevertheless considered the two defenses asserted by Solitron in a letter of March 18, 1970 to Curacao by Solitron's attorney there and in the letter (already mentioned) of May 15, 1970 of Solitron's New York counsel to Curacao.

The two defenses were:

> (i) that the "basic factors and information" on which Solitron decided to operate in Curacao having "disappeared" because of the May disorders and the new "general minimum wage law", Solitron by "force majeure" was "discharged" from the January 12, 1968, contract (p. 6); and
>
> (ii) that Solitron made the contract by mistake induced by assurances of Curacao that the wages then obtaining would continue whereas there was quickly a new and increased minimum wage law (p. 8).

The arbirtators noted that the new minimum wage law did not apply to a private enterprise such as Solitron but only to

employees of the government in Curacao; and that as to the May 1969 disorders these were "an isolated incident" (pp. 10, 11) and not a standard by which to judge the 20 year contract period (p. 11).

As to (i), the arbitrators found that in agreeing to a 20 year lease Solitron could not have expected wages in Curacao to remain the same over the 20 year period as they were on January 12, 1968; that under the contract law of the Antilles force majeure refers to an external cause not foreseeable at the time of the contract; and that wage changes over the 20 year period, foreseeable by Solitron, could never be force majeure (pp. 7-8).

As to (ii), the arbitrators found that whether there had been any assurances to Solitron involved a dispute suitable for arbitration; and that on the evidence there had been no such assurances. Further, the arbitrators found that, for a successful defense of mistake under the contract law of the Antilles, the party pleading mistake (Solitron) must have reasonably believed in the existence of the matter as to which it was mistaken and moreover that such mistaken belief was known to the other party (Curacao). The arbitrators found that neither condition was satisfied in the dispute before them.

The arbitrators accordingly found that the position of Solitron, expressed before but not in the arbitration, was without merit.

The arbitrators then turned to the question of damages.

With one exceptio.. the arbitrators rejected all claims of Curacao for damages for "investment costs" (p. 4), such as erection of the buildings, laying out of roads, etc. These items were rejected because it was said that even if Solitron had performed its obligations, these "investment costs" would have been incurred (p. 11). The one exception was the cost of an acid neutralization plant which was found to have been intended uniquely for Solitron and in which no other lessee would be likely to have an interest. The amount allowed for this (p. 12)

was 53,602.53 "NAfls." (the local currency, Netherlands Antilles guilders; the currency figures hereafter shown without a dollar sign are in local currency). The total amount of "investment costs" claimed by Curacao was 1,521,000.25 (p. 4); the amount not allowed by the arbitrators was thus 1,467,397.72.

The arbitrators allowed 192,482.62 for loss of rent on the two buildings for the period December 1, 1969 to July 1, 1971 (pp. 12, 13). It was found "virtually certain" that Curacao could not find another lessee before July 1, 1971 at the earliest.

For the same period, the arbitrators allowed 1,021.25 as damages on account of fire insurance premiums which Curacao had paid and would pay. Under the January 12, 1968 contract, Solitron agreed at its own expense to insure the buildings against fire (Article 9(6)).

The arbitrators allowed 375,000 for the period December 1, 1970 to December 31, 1973 as damages for Solitron's failure to create 100 jobs as agreed (pp. 14, 15). The basis for this allowance was that, by reason of Solitron's breach, Curacao would have 100 more unemployed in the period than otherwise. Under its laws, Curacao would have to pay "unemployment benefits" to these 100 and also "medical assistance" (p. 14). The amounts of such payments were calculated by using 1969 statistics, with percentage increases for later years as "can be expected". The total amount of such payments for the period was calculated to be 423,671.35 which the arbitrators "ex aequo et bono" reduced to 375,000 to reflect the present value discount (p. 15). The beginning of the period (December 1, 1970) was determined as the date when Solitron's breach occurred. The end of the period (December 31, 1973) was determined a sthe date beyond which the arbitrators would not be justified in awarding this type of damages because the existence of unemployment that far in the future was dependent on unknown factors and "not readily predictable" (p. 16).

The arbitrators did not allow the claim of Curacao for damages for Solitron's failure to create 3,000 jobs by January 1,

1974. This was for the same reason given for ending at December 31, 1973 the award of damages for failure to create the 100 jobs. Damages, if any, for breach of the 3,000 job obligation would be for a period beginning on January 1, 1974 and the existence of unemployment that far in the future was dependent on unknown factors and "not readily predictable" (p. 16).

The arbitrators, as noted, did not—for the reason indicated—award damages for any period after December 31, 1973. It is said in the award, however, that "around January 1, 1974, the more diligent party will be able to submit" certain questions "to arbitration in accordance with the procedure laid down in the Agreement" (p. 16). These questions are: (1) loss of rent after December 31, 1973; (2) fire insurance premiums after that date; (3) damages after that date for failure to create 100 jobs; and (4) damages after that date for failure to create 3,000 jobs.

The arbitrators allowed the cost to Curacao of foreign travel to secure the establishment of industries there. This was found necessary because of the failure of Solitron to perform its obligation to establish such industries. The cost was found to be 25,000 per year and this was allowed for three years—1971, 1972, and 1973. After applying a present value discount, the allowance for this item was 69,000 (pp. 16-17).

The arbitrators allowed the cost to Curacao of custodians to guard the two factory buildings. According to "vouchers produced" (p. 17) this cost was 2,100 per month. The period for which this allowance was made began at August 1, 1970 (presumably because this was the first month for which "vouchers" were "produced") and ended at July 1, 1971 (for the same reason as the allowance for lost rent). For the 11 month period, the total was thus 23,100. After applying a present value discount, the allowance for this item was 21,000 (p. 17).

The arbitrators rejected a claim for the costs of prosecuting the arbitration (pp. 16, 17).

To recapitulate the award to this point, the following items were allowed:

for the acid neutralization plant	53,602.53
for loss of rent to July 1, 1971	192,482.62
for fire insurance premiums to July 1, 1971	1,021.25
for failure to create 100 jobs	375,000.00
for failure to establish industries (foreign travel) (to December 31, 1973)	69,000.00
for guarding the buildings (to July 1, 1971)	21,000.00
	712,106.40

The arbitrators then allowed Solitron a set off for the value of the structural steel and air conditioning plant (but not "chairs and tables"). This value was found to be 266,424.05. (pp. 18, 19)

The net allowance to Curacao was thus 445,682.35.

The arbitrators awarded interest at the rate of 6% (p. 20); it was stated that interest would run from July 10, 1970, the date when the proceedings commenced.

In addition, under Article 12(e) the arbitrators awarded to Curacao against Solitron $7,500 as one-half the fees of the arbitrators and $1,665 as the total of the expenses incurred by the arbitrators, already paid by Curacao.

The award to Curacao was therefore 445,682.35 Netherlands Antilles guilders and $9,165.

The award gives every indication of able, careful, and impartial work by the arbitrators.

4c.

After the award had been made, the procedure followed was that prescribed by the law of the Antilles.

The law requires that the original award must be filed in the Court of First Instance. This was done on August 13, 1970.

Opinion

The law provides that an award "may be executed by the usual procedure of execution in virtue of an order of the Court of First Instance. Under this provision, Curacao asked for issuance of a writ of execution and on August 14, 1970 the Court of First Instance declared the award to be enforceable and issued a writ of execution.

An award may not be "opposed" nor may it be appealed (unless the agreement so provides and that in suit did not so provide).

There is provision in the law for an action to annul the award on grounds which include in general those specified in 9 U. S. C. § 10. Such an action must be brought within three months from the filing of the award in Court. Solitron brought no such action. The award and the judgment entered thereon are final.

In April 1971, a "marshal" of the "Court of Justice of the Netherlands Antilles" served by mail to Solitron in Rockland County a writ based on the award and judgment in Curacao. This writ recited that Solitron "is no longer domiciled in the Netherlands Antilles". (Whether the "Court of Justice of the Netherlands Antilles" is the same as the "Court of First Instance", does not appear.)

Solitron objects that there was "no jurisdiction" over it in Curacao. The objection is so without merit as to be frivolous.

Under the January 12, 1968 agreement, Solitron specifically agreed to submit to arbitration in Curacao, agreed that the laws of the Antilles should be applicable, and agreed that for "everything" connected with that agreement it had a Curacao "domicile" and a resident agent for service of notice and process.

Under such an agreement, there was jurisdiction in Curacao to regulate the arbitration and to enter judgment on the award. There are controlling federal and New York decisions supporting this conclusion. *National Equipment Rental, Ltd.* v. *Szuk-*

hent, 375 U. S. 311, 315-316 (1964); *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268, 1276-77 (2d Cir. 1971); *Gilbert* v. *Burnstine*, 255 N. Y. 348, 247 N. Y. S., 174 N. E. 706 (1931); *New Central Jute Mills* v. *City Trade & Industries, Ltd.*, 318 N. Y. S. 2d 980, 984 (Sup. Ct., N. Y. Cty. 1971); CPLR § 5305(a)(3).

There is an argument for Solitron based on the statement in the 1971 writ that Solitron was then "no longer domiciled" in Curacao. Why such a statement was made is indeed mystifying. Doubtless it is based on the revocation messages of May 12 and 13, 1970 from Solitron to its resident agent in Curacao. It may be that for purposes of proceedings to enforce a judgment, for example, by writ of execution, the revocation of authority was effective, on the theory (dubious in my view) that such proceedings were outside the consent in the January 12, 1968 agreement. There is some support for such a theory in *Sargant* v. *Monroe*, 268 App. Div. 123, 49 N. Y. S. 2d 546 (1st Dept., 1944). For the arbitration, however, and "everything" else pertaining to the agreement, the revocation was ineffective because under the agreement the consent to jurisdiction was irrevocable. Moreover, by the time of the attempted revocation on May 12, 1970, Curacao had already invoked arbitration under the agreement.

6.

Solitron objects because it says it made the agreement on representations of Curacao that "the wage structure would remain stable" (Memo, p. 5) where as the minimum wage was quickly increased "by more than 100% and the agreement was thus "terminated by reason of impossibility" (Memo, p. 5). This objection also has no merit whatever.

It has been determined by highest authority that "claims of fraud in the inducement of the contract generally" are exclusively for the arbitrators. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 404 (1967)

If fraud in the inductment is for the arbitrators, then even more so is any issue, such as frustration and termination, arising *after* an admitted execution of an agreement. This follows from the reasoning of *Prima Paint*. It has been held that "whether circumstances have arisen which have discharged one or both parties from further performance" is a question for the arbitrators. *Heyman* v. *Darwins*, (1942) A. C. 356, 366 quoted with approval in *In re Pahlberg Petition*, 131 F. 2d 968, 970 (2d Cir. 1942). It has been specifically held that "frustration of performance of the contract" is an issue solely for the arbitrators. *Goldhill etc.* v. *Caribbean Shipping Co.*, 56 F. Supp. 31 (S. D. N. Y. 1944)

7.

Solitron objects that the award and judgment are "not final, definite, and conclusive". This objection is based on 9 U. S. C. § 10(d) which provides that an award may be vacated if the arbitrators "so imperfectly executed" their powers "that a mutual, final, and definite award . . . was not made".

The strange point made by Solitron is that the arbitrators did not award damages in a larger amount for a longer period, but instead stopped at the period ending December 31, 1973; "they make no attempt to ascertain the total damages occasioned" (Memo, p. 7). Solitron objects that the arbitrators left open the possibility of a further arbitration in the future to fix the amount of damages after January 1, 1974. The argument is that because the damages awarded Curacao are not sufficient to cover the entire contract period, Curacao should receive nothing, not even what Solitron argues are the incomplete and inadequate damages in the present award. Such an argument is not persuasive.

The federal Arbitration Act is the same or almost the same as the arbitration law in New York, now CPLR §§ 7501 and following. Thus, "the state practice may be regarded as highly persuasive, even if not controlling". *The Hartbridge*, 57 F. 2d

672, 673 (2d Cir. 1932) Section 10(d) of Title 9 is substantially the same as CPLR 7511(b)(1)(iii).

No federal cases have been found which are helpful in connection with the "final" character of an award.

The attitude of New York courts toward arbitration is that such proceedings "are equitable in character". *In re Feuer Transp., Inc.*, 295 N. Y. 87, 92, 63 N. Y. S. 2d (1946)

The kind of award which has been held not "final" is illustrated by *Matter of Overseas Distributors Exchange, Inc.*, 5 A. D. 2d 498, 173 N. Y. S. 2d 110 (1st Dept. 1958). The award left open "the amount which appellants are obligated to pay". The Court said: "These directions are not only indefinite, but the determination of the amounts depends upon more than just arithmetical calculations. Businessmen and accountants can well disagree as to what a set of books shows as being 'due' to a party. An award must be clear enough to indicate unequivocally what each party is required to do."

Another example is *Pyramid, Inc.* v. *Nat. Telefilm Assoc. Inc.*, 40 Misc. 2d 675, 243 N. Y. S. 2d 170 (N. Y. Cty. Sup. Ct. 1963). The award directed an accounting, subject to audit by independent accountants who, if they found the accounting unfair, were directed themselves to prepare an accounting which would be binding. The Court found that the arbitrator had delegated to accountants his power to decide the amount due, and that the award was thus not "final".

In the examples cited, the result was not that the debtor party escaped liability, as Solitron apparently hopes to do, but simply that the matter was resubmitted to the arbitrators to find the amount due.

In the case at bar, the award specifies precisely what Solitron is to pay. Nothing more remains to be calculated at this time. That at some time in the future another arbitration and another award are *possibilities* does not mean that the present award at the present time is not "final" and "definite".

8.

Solitron objects that one of the arbitrators was a judge of a court in Curacao, was thus in the employ of Curacao, and was "not impartial as a matter of law" (Memo p. 8). There is nothing to support the objection. For all that appears, the judge was already retired; in a letter to Solitron, he was said to be leaving the Antilles in August or September 1970. For all that appears, his tenure was for life or for a term unaffected by any decision in this matter.

In any event, Solitron was fully advised as to the employment of the arbitrator but remained silent and made no objection to his acting. The point, whatever its worth, was thereby waived. *Cook Industries, Inc.* v. *C. Hoh & Co., Inc.*, 449 F. 2d 106, 107-108 (2d Cir. 1971).

9.

Solitron objects (Memo, pp. 10, 11) that the award did not arise out of a "legal relationship . . . which is considered as commercial, including a transaction, contract or agreement described in Section 2 of this title . . ." (9 U. S. C. § 202) and thus did not fall under the Convention (9 U. S. C. § 202). The reference to Section 2 is to "any maritime transaction or a contract evidencing a transaction involving commerce".

The Convention, which is enforced by Chapter 2 of Title 9 of the Code, was adopted in 1958 by the United Nations Conference on International Commercial Arbitration. It was provided that each "Contracting State" (and both the United States and the Netherlands became such) could declare that it would apply the Convention only to awards arising from "legal relationships . . . which are considered as commercial . . .". The United States so declared and 9 U. S. C. § 202 so provides.

Research has developed nothing to show what the purpose of the "commercial" limitation was. We may logically speculate that it was to exclude matrimonial and other domestic relations awards, political awards, and the like.

Judged by any test, however, the contract of January 12, 1968 seems clearly to be "commercial". It has been said in this connection (Quigley, Convention on Foreign Arbitral Awards, 58 A. B. A. J. 821, 823 (1972): " In the case of the United States reservation it seems clear that the full scope of 'commerce' and 'foreign commerce', as those terms have been broadly interpreted, is available for arbitral agreements and awards."

It should also be noted that even if the "legal relationship" were not "commercial" the Curacao judgment would be enforceable under the New York law on recognition of foreign judgments which enforces any foreign judgment which is "final, conclusive and enforceable where rendered (CPLR § 5302). There is no "commercial" limitation in the New York law.

In this connection, Solitron suggests that damages should not have been awarded for what Curacao will have to disburse for unemployment insurance and medical assistance, because these involve a "governmental function". The items are most unusual, it is true, and would not be awarded to the usual landlord on breach of a contract. The award could only have been made and justified because Curacao was a government.

The difficulty for Solitron is that, assuming (but without deciding) that it was error for the arbitrators to award such damages, it is not the function of a court to correct such an error. The statute specifies the grounds for vacating an award (9 U. S. C. § 10) but error in fact or law is not among them. *Amicizia Societa Nav.* v. *Chilean Nitrate, etc. Corp.*, 274 F. 2d 805, 808 (2d Cir. 1960). As has recently been said: "arbitrators are not bound by principles of substantive law or rules of evidence". *Lentine* v. *Fundaro*, 29 N. Y. 2d 382, 385, 328 N. Y. S. 2d 418, 421 (Breitel, J., 1972).

Solitron had an opportunity to urge this point before the arbitrators or in the courts of Curacao but elected to forego the opportunity. This Court may not now correct the alleged error.

Opinion

Many years ago, the principle was stated by the Court of Appeals of New York that a foreign judgment was conclusive on the merits. The Court said (*Dunstan* v. *Higgins*, 138 N. Y. 70, 74 (1893); emphasis supplied): "It is the settled law of this State that a foreign judgment is conclusive upon the merits. It can be impeached only upon proof that the court in which it was rendered had not jurisdiction of the subject matter of the action or of the person of the defendant or that it was procured by fraud. . . . But even if it appeared in this case, as it does not, that some legal right of the defendant was denied in refusing the application that would not affect the validity or conclusive nature of the judgment, so long as it stood unreversed and not set aside. Legal errors committed upon the trial or during the progress of the cause may be corrected by appeal or motion to the proper court, but they furnish no defense to an action upon the judgment itself. Where a party is sued in a foreign country, upon a contract made there, he is subject to the procedure of the court in which the action is pending, and must resort to it for the purpose of his defense, if he has any, and any error committed must be reviewed or corrected in the usual way. *So long as he has the benefit of such rules and regulations as have been adopted or are in use for the ordinary administration of justice among the citizens or subjects of the country he cannot complain, and justice is not denied him. The presumption is that the rights and liability of the defendant have been determined according to the law and procedure of the country where the judgment was rendered. . . .*"

10.

The other objections made by Solitron have been considered and found to have no merit.

Both under the federal law and the law of New York, the award and judgment must be enforced.

With reference to Chapter 2 of Title 9 of the Code, the House Committee Report stated that this legislation would "serve the best interests of Americans doing business abroad by en-

couraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U. S. and foreign courts." U. S. Cong. & Admin. News, 3602 (1970). It is apparent that the whole purpose of the legislation was to encourage the arbitration of disputes arising out of transactions by American business in foreign countries. There is every reason to enforce the award and judgment in the case at bar.

The so-called counterclaim in the answer of Solitron is concluded by the award and the judgment. The arbitrators have given Solitron credit for the equipment which is the subject of the counterclaim.

The motion is granted. There will be judgment in favor of Curacao against Solitron for 445,682.35 Netherlands Antilles guilders, to be converted into United States dollars at the rate prevailing on the date of judgment (*Deutsche Bank* v. *Humphrey*, 272 U. S. 517 (1926); *Conte* v. *Flota Mercante*, 277 F. 2d 664, 670-71 (2d Cir. 1960)) with interest thereon at 6% from July 10, 1970 to the date of judgment; and for $9,165 in addition, with interest thereon at 6% from August 13, 1970 to the date of judgment. There will be judgment dismissing the counterclaim on the merits.

Settle judgment on notice.

Dated: New York, New York
February 14, 1973

INZER B. WYATT
Inzer B. Wyatt
United States District Judge

Appendix B

Statutory Provisions

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done*, June 10, 1958, [1970] 3 U. S. T. 2517, T. I. A. S. No. 6997.

Convention done at New York June 10, 1958;

Accession, with declarations, advised by the Senate of the United States of America October 4, 1968;

Accession, with said declarations, approved by the President of the United States of America September 1, 1970;

Accession of the United States of America, with said declarations, deposited with the Secretary-General of the United Nations September 30, 1970;

Proclaimed by the President of the United States of America December 11, 1970;

Entered into force with respect to the United States of America December 29, 1970.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted at New York on June 10, 1958, the text of which is as follows:

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State

other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing

any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters, submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

* * *

ARTICLE VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

* * *

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal

authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provisions of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

* * *

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

* * *

By its resolution of October 4. 1968, the Senate of the United States of America, two-thirds of the Senators present concurring, gave its advice and consent to accession to the Convention with the following declarations:

> "The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

The accession of the United States of America to the Convention was approved by the President of the United States of America with the aforesaid declarations on September 1, 1970, and the instrument of accession was deposited with the Secretary-General of the United Nations on September 30, 1970;

In accordance with paragraph 2 of Article XII, the Convention will enter into force for the United States of America on December 29, 1970, the ninetieth day after the deposit of its instrument of accession;

In accordance with paragraph 2 of Article X and pursuant to a notification by the Government of the United States of America received by the Secretary-General of the United Nations on November 3, 1970, the application of the aforesaid Convention will extend, with effect from February 1, 1971, to all the territories for the international relations of which the United States of America is responsible;

NOW, THEREFORE, I, Richard Nixon, President of the United States of America, proclaim and make public the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to the end that, subject to the aforesaid declarations, it shall be observed and fulfilled, as to the United States of America on and after December 29, 1970, and as to all the territories for the international relations of which the United States of America is responsible on and after February 1, 1971, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this eleventh day of December in the year of our Lord one thousand nine hundred seventy and of the Independence of the United States of America the one hundred ninety-fifth.

[SEAL]

RICHARD NIXON

By the President:
WILLIAM P ROGERS
Secretary of State

Note by the Department of State

List of countries parties to the convention as of December 29, 1970, with texts of declarations and reservations made at the time of signature of the convention or deposit of the instrument of ratification or accession.

* * *

Country	Date of deposit of ratification or accession
Netherlands [1]	April 24, 1964
Referring to paragraph 3 of article I of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Government of the Kingdom declares that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. [Translation]	

* * *

[1] Applicable to the Kingdom in Europe, Surinam and the Netherlands Antilles.

Federal Arbitration Act, 9 U. S. C., Act of July 30, 1947, c. 392, § 1, 61 Stat. 669; Pub. L. 91-368, § 1, July 31, 1970, 84 Stat. 692.

CHAPTER 1.—GENERAL PROVISIONS

§ 1. "Maritime Transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * *

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbe-

havior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was

made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the some force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

* * *

CHAPTER 2.—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agree-

ment as the place of arbitration if such place is within the United States.

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Uniform Foreign Country Money-Judgments Recognition Act, N. Y. CPLR Art. 53, N. Y. Laws 1970, c. 981.

§ 5301. Definitions

As used in this article the following definitions shall be applicable.

(a) Foreign state. "Foreign state" in this article means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands.

(b) Foreign country judgment. "Foreign country judgment" in this article means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

§ 5302. Applicability

This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

§ 5303. Recognition and enforcement

Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense.

§ 5304. Grounds for non-recognition

(a) No recognition. A foreign country judgment is not conclusive if:

1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

2. the foreign court did not have personal jurisdiction over the defendant.

(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;

2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

3. the judgment was obtained by fraud;

4. the cause of action on which the judgment is based is repugnant to the public policy of this state;

5. the judgment conflicts with another final and conclusive judgment;

6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

§ 5305. Personal jurisdiction

(a) Bases of jurisdiction. The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:

1. the defendant was served personally in the foreign state;

2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;

3. the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

4. the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

5. the defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or

6. the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

(b) Other bases of jurisdiction. The courts of this state may recognize other bases of jurisdiction.

§ 5306. Stay in case of appeal

If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign country judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

§ 5307. Recognition in other situations

This article does not prevent the recognition of a foreign country judgment in situations not covered by this article.

§ 5308. Uniformity of interpretation

This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact these provisions.

§ 5309. Citation

This article may be cited as the "Uniform Foreign Country Money-Judgments Recognition Act."

Appendix C

Judgments Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of December one thousand nine hundred and seventy-three.

PRESENT: HON. IRVING R. KAUFMAN, Chief Judge,
HON. J. JOSEPH SMITH,
HON. JAMES L. OAKES, Circuit Judges.

73-1664

THE ISLAND TERRITORY OF CURACAO,
Petitioner-Appellee,

v.

SOLITRON DEVICES, INC.,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

C 2

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Petitioner, Island Territory of Curacao having moved to have an arbitration award dated August 13, 1970 confirmed by this court under Title 9 U. S. C. Chapter 2 and to enforce the judgment of the Court of First Instance of Curacao, entered pursuant to that award under Article 53 of the New York Civil Practice Law and Rules, respondent Solitron Devices Inc., having filed a counterclaim for $221,855, having heard the argument of counsel and due deliberation having been had thereon and appearing to the satisfaction of this court that the said award and judgment should be enforced and said counterclaim should be dismissed, and the court having entered and filed an opinion on February 14, 1973,

IT IS ORDERED that said motion to confirm the arbitrator's award and enforce the judgment thereon is granted and the arbitrator's award be and the same hereby is confirmed and the judgment is hereby enforced, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of petitioner Island Territory of Curacao and against respondent Solitron Devices, Inc. for the sum of $248,690.75, representing the value of 445,682.35 Netherlands Antilles guilders as at February 21, 1973 at the exchange rate of .558 guilders to the U. S. dollar together with interest at 6% from July 10, 1970 to date hereof and $9,165 together with interest at 6% from August 13, 1970 and the cost of this proceeding to be taxed by the Clerk, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that respondent's counterclaim be and the same hereby is dismissed with prejudice.

INZER B. WYATT
U. S. D. J.

Dated: New York, New York
February 28, 1973

Judgment Entered Mar. 1, 1973
THOMAS E. ANDREWS
Acting Clerk

(4160)

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